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No. 54

In the Supreme Court
of the
United States

OCTOBER TERM, 1935.

GEORGE EVERETT LEGG,
Petitioner,

v.

E. ST. JOHN,
Trustee.

Certiorari to
C. C. A.
Sixth Circuit.

SUPPLEMENTAL BRIEF FOR TRUSTEE

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On page 6 of our first brief, where authorities were cited in support of the proposition that the indemnity feature is separate, distinct, and independent of the life insurance feature, we add the following:

Chat. Pipe Wks. v. Dumler, 62 A. L. R., 1003 (Miss.)
Penn. Mu. Ins. Co. v. Hartle, 91, A. L. R. 1466. (Md.)
N. Y. Life Ins. Co. v. Davis, (Fed.)
Greber v. Equitable, (Arizona.)
Chambers v. N. Y. Life. (N. Y. Supp.)
Kaffanges v. N. Y. Life, 59 Fed. (2nd) 475.
Conn. Ins. Co. v. Brandstein. (N. Y. Supp.)
Cravens v. Robbins, 8 Tenn. App., 437.
See comments on most of these cases in 91 A. L. R., 1470.

A head note fairly states the Court's holding in the Maryland case, decided May 26, 1935.

> "A supplemental agreement attached to a life insurance policy whereby, for an additional premium, an insurer contracted to pay a stated sum monthly in event of the total and permanent disability of the insured, to waive the payment of premiums under the policy during the period of such disability, and to pay double the amount of the life indemnity if the death of the policyholder should result from an accident, does not become an indivisible part of the policy, and is, therefore, susceptible of rescission because of material misrepresentation in the application though the policy itself, by reason of an incontestable clause, is not."

91 A. L. R., 1466. *Pa. Co. v. Hartle.*

In Kaffanges v. New York Life Insurance Company, the policy was issued in August, 1926, and contained an incontestable clause as to *death* benefits, but not as to *disability* provisions. The Circuit Court of Appeals, First Circuit, held that the disability clause was procured by fraud and ordered it cancelled, notwithstanding the incontestable clause as to the life insurance feature.

59 Fed. (2nd.) 476.

A Disability Policy Has No Cash Surrender Value

We readily agree that a disability insurance policy has no cash surrender value, within the meaning of section 70a of the Bankrupt law. A Disability insur-

ance policy does not grow in value, as does a life policy, as the years go by. On the contrary the possibility of it ever being of any value becomes less and less each year until the age of 60 is reached, when the contract (policy) expires by limitation, and is worthless.

This will account for the disparity in premiums, $425.83 per year for the life feature, and $49.39 for the disability feature. See the separate policies—(R. 6 A, and 6 C) of the Record.

The Bankrupt act means that when the bankrupt has a policy of life insurance which has a cash surrender value (and none but life insurance have such value), he may pay that value to the trustee in bankruptcy, and, in the language of the bankrupt statute, "continue to hold, own, and carry such policy free from the claims of creditors," etc.

While the bankrupt law speaks of "surrender value" it does not mean that the policy shall be surrendered, given up to the Insurance Company for cancellation, but means that if the "surrender value" is paid to the trustee, the policy with its surrender value will continue to be the property of the insured bankrupt free from the claims of creditors.

While the Bankrupt Law says "any insurance policy which has a cash surrender value" it clearly refers to life insurance. It does not mean fire, marine, or fidelity insurance.

Here the indemnity policy has matured. It is no longer a policy. It has been merged into an acknowl-

edged, definite, certain, liquidated obligation on the part of the Insurance Company to pay Legg a certain amount every month.

Let us suppose that Legg had become totally and permanently disabled by the loss of both feet in a railroad accident, while a passenger, and had compromised his claim for damages against the Railroad Company for $25,000.00, payable in ten equal, annual installments. No one would say that he could go into bankruptcy and keep as his own the sums that the Railroad Company owed him, instead of turning them over to the trustee as assets to be administered.

Precisely the same principle will apply to the indemnity payments provided by the disability policy. The same accident which gave him a right of action against the railroad, gave him a matured, liquidated debt against the Insurance Company. After the compromise, in which the $25,000.00 became a debt of the Railroad Company, both were debts due to Legg.

By the terms of section 70a (5) the trustee in bankruptcy shall be vested with the title to "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

It is no answer to say that the indemnity payments were contingent upon Legg's continuing to be totally disabled. Of course, if he should be restored to health the payments would stop. But that is not a matter about which the bankrupt can complain until his debts are paid.

In a case in which the bankrupt's commissions on renewal premiums, amounting to about $5000 per year and having several years to run, it was held that the commissions were property to go to the trustee.

It was also held that the fact that the interest in property is defeasible and contingent does not prevent it from being transferable, within the meaning of Sec. 70a.

In re Wright, C. C. A. (2nd. Cir.) 157 Fed., 544.
In re Baudouine, 96 Fed., 538.

"The title to the property remained in Collander until it was destroyed by fire, and also the title to the policies. Hence the destruction of the property changed or ripened the conditional obligation of the insured into a fixed obligation to pay the amount of indemnity stipulated for in the policy. To hold that this ripening of the obligation made it after acquired property, which would not vest in the trustee, but which the bankrupt could hold as his own would be as absurd," etc.

Fuller v. N. Y. Fire Ins. Co., Supp, Ju. Ct. of Massachusetts, 67 N. E. 800.
Mu. Life Ins. Co. v. Smith, C. C. A., (1st. Cir.). 184 Fed., 5.
In re Kern, 8 Fed. Supp., 246.
Cohen v. Samuels, 245 U. S. 50, 52-53.

See Tenn. Law Review Article, Volume XI, number 2, Feb. 1933, pages 84-95.

The "cash surrender value" of a life insurance policy need not be expressly stipulated in the policy. The Court said:

> "The material and important fact is that . . . the policy had a value which the company was willing to pay and, which the bankrupt by his own act could obtain."

Here Legg was obtaining a certain amount each month.

In re Gannon, 247 Fed. 936. (C. C. A., 2nd Cir.)

A case much relied on by the Bankrupt in this case, construes a Pennsylvania statute, said to be identical with the Tennessee exemption statute. That case presented an annuity contract which provided that the insured should receive a monthly annuity at the age of 65 for the remainder of his life. The case is easily distinguishable from this as the following excerpt from the Court's opinion will show:

> "We do not agree, however, that they (payments) are for the sole benefit of the annuitant. We think it clear that where, as in this case, the wife is named as beneficiary, the contract is made for the benefit of the wife."

Bowers v. Reinhard, (C. C. A. 3d.) July 12, 1935.

Here no one is named as beneficiary except Legg himself in the contract of indemnity.

By express provision "the trustee of the estate of a bankrupt" . . . "shall in turn be vested . . . with the title of the bankrupt" . . . to all . . . "property which prior to the petition he could by any means have transferred," etc. Sec. 70a (5).

That this includes the Disability Policy is shown in the policy itself which provides that the indemnity

is payable "to the insured, or a person designated by him for that purpose." (R. 6C 2.)

If the bankrupt could "transfer" the policy to "a person designated," then the title vested in the trustee in bankruptcy by this express provision of the bankrupt law.

We have modified the views expressed in former brief to the extent of admitting that there is no surrender value to a Disability Indemnity Policy.

Indemnity policies, "giving the permanently disabled policy holder . . . a monthly income," were first introduced about 1920. (Brief for Legg, 14 (d).

This was 22 years after the enactment of the bankrupt law with an insurance provision, and seven years after the decision in Burlingham v. Crouse, 228 U. S., 473.

The Trustee is not claiming "a vested property right" in Legg's disability. The case has passed the "disability" stage. The disability has ripened into a liquidated debt, which the Insurance Company admits, has been paying, and will continue to pay until such time as the insured, "on demand from the company," shall fail to "furnish due proof of the continuance of such disability." It is no longer a question of "earnings," but merely that of paying admitted liability.

CONCLUSION

The Trustee believes that the Referee, District Judge, and the Circuit Court of Appeals were justified

in holding that the contracts were wholly separate one from the other, the one, a contract of life insurance, the other a contract of Indemnity, and as the bankrupt or petitioner in this cause was actually receiving the benefits *himself* that he does not come within the class intended to be protected by 8456 or 8458 of the Tennessee Code, or 70a of the Bankruptcy Act.

We believe that the reasoning of the various cases we cited is sound, that the two policies are separate and distinct, one from the other; the contracts were physically separated; the premiums were of different amounts, the hazards are different; the beneficiaries are different. Both policies were signed by the President and Secretary of the Company which was wholly unnecessary if one contract. The contract of indemnity may be cancelled without the cancellation of the life insurance policy, which could not be done if one and the same contract, as claimed by Petitioner. The cancellation of one would have been the cancellation of both. The contract of indemnity says in express terms, last paragraph, under sub head 2, that no other provision except (a) and (b) not pertinent in this case, shall be deemed a part hereof. We think they are separate, by their own express terms.

Regarding our contention that these disability payments are not exempt under the Tennessee Code, we think that sections 8456 is self explanatory in that it says "*in case of his death,*" which is not the case at bar.

As to 8456 and 8458 we have cited two Tennessee

decisions, *Cravens v. Robins*, 8 Tenn. App. 437, and *Sparkman v. Chandler*, 162 Tenn. 614. Both cases define who are in the classes intended to be protected. The income must not be received by the insured but must be received by some wife, child or dependent relative, as set out in 8458. Granting for argument's sake that it is an "annuity," still for the same reason it would not be exempt under the Tennessee Code because the insured is not in the specified classes, and as these statutes are in derogation of common law they should have a strict interpretation.

We believe this case is unlike the case of *Local Loan Co. v. Hunt*, 292 U. S. 234, relied on by petitioner, because there the issue was an unearned salary; the consideration for the pay had not passed, and did not pass until the labor was expended, which was after bankruptcy. Here it is quite the contrary, in fact it is a present property right existing at the time of the filing of the petition, vested, nothing else to be done, a contract ripened into an obligation for a definite amount, payable to a definite person on definite dates, similar to a series of notes receivable, or a life estate, whose duration is uncertain, or a remainder interest, etc., all of which pass to the Trustee. We claim that this was a property right, bought and paid for, nothing else to be done at the time of the filing of the petition and that this right passed to the Trustee, as such. That it would be unreasonable to say that if the Trustee had notes which had not yet matured, and could not be reduced to judgment until maturity, would be after acquired property and not a vested property

right. Yet we believe that the Petitioner has been driven to this extent in his brief. The indemnity or supplemental contract is no longer an insurance policy but a matured obligation, liquidated, concrete, absolute, and definite on the date of the filing of the bankrupt's petition. The only uncertainty relative to the disability payments was the length of time for which they were to be paid and not the person, which contingency does not divest the Trustee of the property as an asset.

Suskin & Berry, Inc., v. James Rumley,
68 A. L. R., 772.

We believe, in conclusion, that to hold that the Petitioner could have these payments declared exempt under 70a and not to pass to the Trustee as assets, would be to put him on a higher plane than if he were working for a salary, in which case he would only receive the benefit of $40.00 per month exemption, which he has and is receiving monthly, and would in effect nullify the true meaning of 70a passed in 1898, twenty-two years before the origin of this type of insurance (their B. p. 14), and which Act exempted *ONLY policies* of *insurance* which had a *cash surrender* value. *This contract of indemnity had none.*

What Congress meant was that if the Bankrupt had any property of any nature whatever, at the time of Bankruptcy, except as specifically exempted, he must turn it over to the Trustee for the benefit of his creditors. Congress went still further and said in ex-

press terms in 70a "property which prior to the filing of petition he *could by any means have transferred*," etc. The supplemental contract says it will pay to him or to a person *designated* by him; if he could designate, he could transfer and therefore the Trustee contends that Congress defined this contract of indemnity as a present vested property right, in express terms, and said that those rights passed to the Trustee as assets.

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